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No. 86-848

IN THE SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1986

JUDE R. HAYES,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF OF PETITIONER

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SUMMARY OF ARGUMENT

The search warrants which are the subject of this petition for certiorari authorized government agents, based at most on suspicion that some 58 named patients of a medical doctor had received excessive prescriptions of specific Schedule II medication, to rummage at will through the medical records of all 10,000 of his and his colleagues'

patients, and to seize at will any file in which any controlled medication -- whether Schedule II or not, from valium to librium to tylenol with codeine -- had ever been prescribed, regardless of the illegality of the particular prescription. 1/ The search and seizure thus authorized was more extreme than any that has ever been tolerated of medical records, and more unnecessary and intrusive than any ever approved of any business by this or any lower federal court.

1/ Petitioner has never conceded even that the government had probable cause to search for those 58 files, based on no more than the opinion of a consultant to the state's medical licensing board that the prescriptions might have been "excessive" -- a standard applied by state authorities in licensing proceedings, but never before considered the standard for criminal penalties under federal law. The government's choice, not to so limit the warrant however makes that question wholly academic.

In opposing a grant of certiorari to review this unprecedented search, the Government seeks to portray the exploratory search warrants upheld below as consistent with precedent from other circuits and, in any event, as "fact-bound." Government Opposition at 8. And if a general search is permissible, the Government contends, then it follows that agents are permitted, solely within their discretion, to determine what among the general categories of records they should be allowed to seize. Gov't. Opposition at 11-12.

The Government's own arguments make clear the pressing need for this Court to review the decision below. The question of the constitutionality of general searches of business records is one that has generated conflicting approaches in the circuit courts. The divided decision

of the Ninth Circuit in this case goes beyond even those circuit decisions which have heretofore been the most tolerant of such exceptions to the Fourth Amendment's particularity requirement. Moreover, to the extent that the decision is "fact bound," it is bound to facts which should have commanded a narrower approach; as Judge Pregerson emphasized in dissent:

> The failure to limit the warrants so as to minimize intrusions upon patient's privacy interests is particularly troublesome because the documents to be searched were primarily medical records. Information contained in patient files is extremely personal and potentially embarrassing to innocent third parties. Unlike the cases cited by the majority, in which the searches generally involved a narrow class of business transactions, the search in this case encompassed personal medical history contained in thousands of patient files. The Magistrate's failure to narrow the scope of the search resulted in massive intrusions on personal privacy interests.

App. 112-113. 2/

2/ Indeed, not only were thousands of patient files unnecessarily reviewed by federal officers in the course of the searches, but eighteen of the files actually seized from the offices

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ARGUMENT

The last time this Court addressed the application of the fourth amendment's particularity requirement to searches of business records was in 1976, in Andresen v. United States, 427 U.S. 463, 479 (1976). The warrants challenged in Andresen, after an "exhaustive list of particularly described documents" relating to the crime of false pretenses with respect to Lot 13T in a stated development, included the phrase "together with other fruits,

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included no prescriptions at all for any controlled medications, and somewhere between one-quarter and one-third of those seized included no prescriptions for Schedule II medications, which were admittedly the focus of the Government's investigation. ER 412-413. See also App. 105 n.1 (Pregerson, J., dissenting) (prosecutor's concession that the warrants should have been limited to the fifty-eight named patients, or to Schedule II medications). In the course of the search, agents also examined confidential legal files in a locked file cabinet in a separate conference room, and the contents of a briefcase of a financial consultant who happened to be present. ER 177-79; 182; App. 17.

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instrumentalities and evidence of crime." This Court upheld the warrant on the ground that the final phrase "must be read as authorizing only the search for and seizure of evidence relating to 'the crime of false pretenses with respect to Lot 13T'. . . The warrants, accordingly, did not authorize the executing officers to conduct a search for evidence of other crimes but only to search for and seize evidence relevant to the crime of false presenses and Lot 13T." 427 U.S. at 480-82 (emphasis added).

Andresen established the rule that probable cause to believe there is particular evidence of wrongdoing with respect to a particular transaction cannot be translated into authority to rummage for evidence of other wrongoing with respect to other transactions. The Government, in opposing review in this case, ignores Andresen altogether. Rather, the Government

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chooses to focus on decisions of the circuit courts in the decade since Andresen which have created an uncertain exception to its rule in cases where particularity is not possible because there is probable cause to believe that criminal activity is "pervasive" and that it "permeated the entire business operation." United States v. Kail, 804 F.2d 441 (1986). See Govt. Opposition at 7-8.

This Court has yet to address the constitutionally permissible scope of this exception to the fourth amendment's particularity requirement. And, notwithstanding the Government's efforts here to gloss over the differences, the circuit courts have adopted explicitly varying approaches. Compare, for example, United States v. Brien, 617 F.2d 229 (1st Cir), cert. denied, 446 U.S. 919 (1980) and United States v. The Offices Known as

Fifty State Distributing Co., 708 F.2d 1371 (9th Cir. 1983), cert. denied, 465 U.S. 1021 (1984) with Voss v. Bergsgaard, 774 F.2d 402, 406 (10th Cir. 1985) (explicitly declining to follow Brien and Fifty State Distributing Company).

Contrary to the Government's assertions, this case affords a uniquely compelling occasion for much needed review of these post-Andresen precedents. That is so for three reasons.

First, this case stretches the "pervasiveness" exception wholly beyond the bounds of prior precedent. The Government in opposing review makes much of the fact that based on their review of pharmacy records, government agents constructed profiles of 75 specific patients who had received Schedule II medications, and that its expert then opined that petitioner or his employees "had prescribed excessive

narcotics in more than three-quarters of the profiled cases." Gov't. Opposition at 11-12. The emphasis on "three-quarters" is entirely deceptive. In order to construct its profiles, the Government reviewed over 5,000 prescriptions at 15 different pharmacies. Of these, prescriptions for only 75 patients were considered suspect in the first instance; and suspicion was confirmed by an expert for only 58 of these.3/ All told, the Government's

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3/ That "expert" opinion hardly establishes probable cause for a criminal violation of federal law. See note 1 supra. Nor do the two additional individual instances cited in the affidavit. In addition to the patient profiles, the affidavit submitted by the government reported the complaints of one prior patient of Dr. Hayes, and the experience of one sheriff's deputy who was treated by Dr. Hayes. The former patient later testified at the hearing on the motion to suppress that he complained after Dr. Hayes discovered that he was seeing multiple physicians to secure multiple prescriptions, and terminated him as a patient. ER 371. The prosecution's own expert witness concurred with Dr. Hayes' evaluation of this patient as a "sociopath." 16T 2246 (testimony of Dr. Meyers); 26T 3929 (testimony of Dr. Hayes). The sheriff's deputy admitted later in her actual

suspicion was limited to fewer than one percent of Dr. Hayes' patients. If suspicion as to less than 1% of a doctor's practice is sufficient to give rise to a search of all his medical records, then the very notion of "pervasiveness" loses all meaning, and the constitutional exception becomes the rule.

United States v. Abrams, 615 F.2d 541 (1st Cir. 1980) is directly on point, and the Government's efforts to distinguish it are wholly unpersuasive. In Abrams, as here, the Government suspected doctors

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testimony that physical exams were performed, that Dr. Hayes sought access to her medical records and attempted to arrange for x-rays, that she complained of serious back injuries and told Dr. Hayes that she feared loss of her job in the interim if her back was re-injured; the jury did not convict on any of these counts. 12T 1623, 1627-32, 1639-40, 1649, 1651-52. See also 26T 3865-88 (testimony of Dr. Hayes). Moreover, the specific allegations relating to the prior patient and the sheriff's deputy, even if credited, do not by any standard amount to probable proof of "pervasive" violations of federal law, and the government cannot and does not so argue.

of criminal wrongdoing with respect to 50 particular patients. The Court squarely held that suspicion as to 50 cases was simply not enough to justify a search of all of a doctor's billing records. The Government's suggestion that Abrams can be distinguished on the grounds that the warrants there were not limited "to a particular category of records" simply misstates Abrams: in fact, the warrants there were limited to billing and medical records showing fraudulent services claimed from medicare and medicaid. 615 F.2d at 542. But as the court recognized, "were we to hold the search in this case to be justified by the affidavit [pointing to 50 such suspected cases], we can see no basis for invalidating in a future case a search and seizure of all records of payables and expenditures relying on an affidavit that some unspecified percentage

of a business's expenditures exceeded the relevant bill payable." 615 F.2d at 544 n.7. The divided decision below creates precisely the precedent which the first circuit in Abrams explicitly eschewed.

Second, the case for review is compelling here because a broad and general search was concededly unnecessary. The decisions relied upon by the Government here which have recognized a broad exception to the particularity requirement have done so explicitly on the ground that broad searches must be tolerated where a narrower and more particular warrant is impossible. See, for example, United States v. Bright, 630 F.2d 804, 812 (5th Cir. 1980); United States v. The Offices Known as Fifty State Distributing Co., 708 F.2d 1371 (9th Cir. 1983). See also United States v. Roche, 614 F.2d 6 (1st Cir. 1980) (limiting approval of

broad business searches, upheld in United States v. Brien, to cases where segregation of legitimate and fraudulent activity is impossible). This is simply not a case where a broad and general search was necessary.

The prosecutor himself conceded just that in his oral argument below. In a telling admission which the Government understandably now seeks to dismiss, the Assistant United States Attorney acknowledged that the failure to limit the warrants was a "mistake" attributable to sloppy work in his office:

> At oral argument, the United States attorney assigned to this case repeatedly acknowledged that the failure to limit the search warrants to records involving Schedule II drugs or specific patients was a "mistake" on the part of the agents who drafted the warrants. Government counsel conceded that "in hindsight" the warrants should have been limited to the suspect patient files referred to in the affidavits. . . . In fact, counsel candidly admitted that, "I was quite surprised that [the warrant] ended up reading the way it did."

App. 105 n. 1 (Pregerson, J., dissenting). The Government now suggests that this admission should be ignored because it was only the final draft of the affidavits and warrants which the prosecutor failed to review, and because the prosecutor, notwithstanding his admitted "mistake," nonetheless sought affirmance of the convictions. But it is, of course, the final draft which is at issue in this case. And the fact that the Government continues to seek affirmance does not negate the force of its own concession that a general search was entirely unnecessary on the facts of this case, thus rendering the divided decision below an unprecedented extension of the law.

Third, review is mandated here because what is involved is not records of commercial business activity, but medical records. These are, as Judge Pregerson

recognized in dissent, the most private and personal and potentially embarrassing kind of records which the Government could search for and seize. In Andresen, this Court recognized that "there are grave dangers inherent in executing a warrant authorizing a search and seizure of a person's papers that are not necessarily present in executing a warrant to search for physical objects whose relevance is more easily ascertainable." 427 U.S. at 482 N. 11. Those dangers are greater still when the records involved are personal medical records, and when the very breadth of the warrants mandates the exercise of unguided discretion by government agents utterly untrained to distinguish among ailments, prescriptions, dosages and diagnoses. 4/ The Government

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4/ All of the medications listed in Schedules II through V have legitimate medical uses. There is

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in opposing review simply ignores this aspect of the case.

Even as it ignores the "fact" that personal medical records are involved here, and seeks to underplay the "fact"

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substantial disagreement within the medical community as to when these medications are appropriately used for the treatment of chronic pain. See J. Carlova, "Patients in Pain Can Put You in Jail," Medical Economics, Nov. 12, 1984, at 195 ("nebulous community standards" rule "is a trap that almost any unwary physician could get caught in"); F. Tennant & G. Uelmen, "Prescribing Narcotics to Habitual and Addicted Narcotic Users," Western J. Medicine 539, 541 (1980) ("Physicians' confusion over this issue often deprives patients of humane treatment in relieving pain"); C. Wallis, "Unlocking Pain's Secrets," Time, June 11, 1984, at 58-59 (vast majority of study patients receiving drug treatment for pain were grossly undermedicated; obsession with drug addiction "has led to a serious problem with underdosing"). At trial and on appeal, petitioner vigorously contested the government's efforts to convert this dispute within the medical community into a basis for federal criminal liability. At the very least, the complexity of the underlying determinations involved in providing appropriate medical treatment for sufferers of chronic pain ought to counsel greater specificity and guidelines in warrants, rather than the wholesale abdication of standards present here.

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that the prosecutor conceded that the general warrants were unnecessary, the Government contends that the decision below need not be reviewed on the grounds that it is "fact-bound." Gov't. Opposition at 8. But in doing so, the Government points to no other "facts" which might render this case an inappropriate vehicle for Supreme Court review of the important issues presented. Rather, in footnote, the Government explaints its "fact-bound" argument by pointing to precedents holding that all probable cause determinations are "practical, commonsense determinations" by magistrates, entitled to deference on review. Gov't. Opposition at 8 n. 7. But magistrates are not the final arbiter of the fourth

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amendment's requirements. The legal issue posed so starkly here is whether suspicion as to a small and unspecified percentage of a medical practice can constitutionally support the issuance of general warrants to search all patient records, and to seize any record in which any controlled medication has been prescribed, regardless of its probable legality. Far from being "fact-bound," the decision below squarely threatens businesses and professional practices with searches of unprecedented breadth and scope, notwithstanding the absence of any practical law enforcement need for them, and notwithstanding the massive intrusions on privacy which inevitably accompany them. That is a legal issue deserving of this Court's review.

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CONCLUSION

For the foregoing reasons, petitioner respectfully requests that this Court grant certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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